Filed 3/17/14 Laguna Dana Investments v. Sirous & Sons Rug Gallery CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAGUNA DANA INVESTMENTS, LLC, Plaintiff and Respondent, v. SIROUS & SONS RUG GALLERY, INC., et al., Defendants and Appellants.	G048254 (Super. Ct. No. 30-2011-00493353) O P I N I O N

Appeal from an order of the Superior Court of Orange County, David T. McEachen, Judge. Reversed and remanded with directions.

C. Keila Nakasaka and Joseph C. Rosenblit for Defendants and Appellants.

Sedgwick LLP, Curtis D. Parvin and Joseph M. McFaul for Plaintiff and Respondent.

Sirous & Sons Rug Gallery, Inc. (Sirous & Sons), and Sirous Ghasemian (Ghasemian), appeal from the order denying their Code of Civil Procedure section 473, subdivision (b),[1] motion to vacate the $857,990 judgment against them in favor of their former landlord, Laguna Dana Investments, LLC (Laguna Dana). On the day noticed for trial, a representative of Sirous & Sons appeared but the corporation was not represented by counsel, and Ghasemian did not appear at all. The trial court struck the Sirous & Sons' answer, ordered the matter would proceed in default, and directed Laguna Dana to return within two days with a default judgment. Two days later, Laguna Dana filed declarations and exhibits and the court signed and entered its proposed judgment against Sirous & Sons and Ghasemian. We conclude the judgment against Sirous & Sons is void because the trial court had no power to strike its answer and proceed by way of default. When Sirous & Sons did not appear, the trial court's only options were to proceed with the trial in its absence in accordance with section 594 or continue the trial. For reasons that we will explain, however, because there has been no showing or cogent argument the judgment was improper as to Ghasemian, the judgment against Ghasemian must stand. Accordingly, the order denying the motion for relief under section 473 is reversed and the matter is remanded with directions to vacate the judgment against Sirous & Sons and set the matter for trial.

FACTS & PROCEDURE

None of the pleadings in this action (complaint, amended complaint, answers) were included in the record on appeal, but from various documents that are in the record we can ascertain this action began as an unlawful detainer action filed in July 2011 by lessor Laguna Dana against lessees "Del Mar Rug Gallery, Inc., [(Del Mar)] Sirous P.A. Ghasemian, and Sirous & Sons Rug Gallery, Inc." (capitalization in original omitted; hereafter sometimes collectively referred to as the defendants), seeking to

[1] All further statutory references are to the Code of Civil Procedure.

recover possession of commercial property and unpaid rent. A joint stipulation dated December 2011, signed by attorney Steven D. Silverstein as counsel for all the defendants, identifies Del Mar and Ghasemian as the tenants on the lease, and states Sirous & Sons is the successor in interest to Del Mar. The lease was signed by Ghasemian as president of Del Mar. The defendants agreed to give up possession of the property, answer Laguna Dana's second amended complaint, and transfer the matter to the regular civil calendar. The register of actions indicates Sirous & Sons and Ghasemian filed an answer on February 7, 2012.

Additionally, prior to this action being filed, Ghasemian and Sirous & Sons, represented by attorney Ronald W. Crislip, filed a separate action against Laguna Dana alleging various contract and tort causes of action also arising out of their lessor-lessee relationship. (*Sirous P.A. Ghasemian et al. v. Laguna Dana Investments, LLC etc.*, Super. Ct. of Orange County No. 30-2011-00473087 ("the Ghasemian Action").) These actions were not consolidated. In the joint stipulation in this action, the parties agreed defenses and claims asserted in one action would not affect defenses and claims asserted in the other action. The gist of the underlying dispute is that Laguna Dana contended the defendants owed unpaid rent exceeding $250,000. The defendants contended a massive water intrusion into the premises due to a flood caused over $16 million in damages to the defendants' Persian rug inventory and relieved them of their rent obligations.[2]

Trial in the current action was set for October 22, 2012, with the defendants being represented by attorney Silverstein. On September 5, 2012, Silverstein filed a motion to be relieved as counsel of record. On September 25, 2012, the motion was

---

[2] On December 9, 2013, Sirous & Sons and Ghasemian filed motions to take additional evidence on appeal (§ 909) and for judicial notice (Evid. Code, §§ 452, 459), of a November 22, 2013, arbitrator's award apparently arising out of the Ghasemian Action. As this evidence was not before the trial court in this action, we deny those requests.

granted. There is no reporter's transcript from that hearing and the moving papers are not included in the clerk's transcript.

On September 14, 2012, Laguna Dana filed discovery motions including a motion to compel Sirous & Sons to produce documents, a motion to compel Sirous & Sons to designate and produce the person most knowledgeable for deposition, and a motion to compel the deposition of "Sirous Ghasemian aka Saied Marlan." On October 9, 2012, the discovery motions were granted and Sirous & Sons was ordered to pay sanctions totalling $2,297 on the first day of trial.

On September 27, 2012, Sam Maralan, identifying himself as "CEO, Sirous [&] Sons Rug Gallery" filed an ex parte motion to continue the trial. There was no mention of the individual defendant, Ghasemian, in the motion. Maralan's declaration stated that when Silverstein's motion to withdraw was heard on September 25, Parisa Hodjati, the company's CFO, was present but the court denied "our" request for a continuance so the corporation could find an attorney. He declared Silverstein had indicated to the trial court that Sirous & Sons had retained new counsel, but it had not. The ex parte motion was heard and denied on September 28. The minute order indicates Maralan was present at that hearing and a discussion was held between Maralan and the court regarding the need for the corporation to be represented by an attorney.

On October 19, 2012, Laguna Dana filed its trial brief for the October 22 trial, and three in limine motions. As relevant here, one sought issue preclusion orders or terminating sanctions due to Sirous & Sons' failure to comply with the court's earlier discovery orders. The other requested the court to strike Sirous & Sons' answer to the complaint and enter its default because it did not have counsel.

On October 22, Laguna Dana appeared for trial. Sirous & Sons was not represented by counsel, but Maralan was present in the courtroom. There was no appearance for Ghasemian, and no explanation given for Ghasemian's absence. There is no reporter's transcript from the hearing. The minute order states Sirous & Sons was

unrepresented, the court ordered its answer stricken "and proceed in Default. [¶] Court orders Default entered as to Sirous & Sons . . . . [¶] [Laguna Dana's counsel] is ordered to prepare the Default Judgment and submit to the [c]ourt by . . . October 24, 2012." (Original bolding omitted.)

The next day, Laguna Dana filed a statement of damages claiming $857,990.13 in damages in the form of unpaid rent, late fees, unpaid tenant improvements and tenant caused damage to the premises, and prejudgment interest. On October 24, Laguna Dana filed a "Case Summary" declarations of witnesses "in lieu of trial testimony," and an attorney declaration "authenticating trial exhibits" with exhibits attached. Also on October 24, the court signed and entered the judgment submitted by Laguna Dana, which stated "[t]rial in this action came on regularly on October 22, 2012" and there were no appearances for the defendants. The court awarded Laguna Dana damages of $857,990.13, against Del Mar, Sirous & Sons, and Ghasemian, plus costs and attorney fees to be determined.

Motion to Set Aside Default

On December 20, 2012, Sirous & Sons and Ghasemian filed a motion "to set aside the default entered against them on October 22, 2012" and for relief from the order striking the answer of Sirous & Sons, due to mistake, surprise and excusable neglect under section 437, subdivision (b). The motion was filed by attorney Howard Neufeld "[s]pecially [a]ppearing" for Sirous & Sons and Ghasemian. The motion was accompanied by a declaration from Hodjati, who stated Ghasemian was out of the country when Silverstein's motion to be relieved as counsel was heard. Hodjati's son, Maralan, could not attend the hearing, so Hodjati went instead. Hodjati stated Silverstein misrepresented to the court there was another attorney who would be taking over the case. Hodjati asked for a 60-day continuance of trial, but was told only an attorney could make such a request. Hodjati was under the impression that as long as

they found an attorney before trial, the court would grant a continuance, which is what she told Maralan.

Maralan declared Ghasemian asked him to find counsel for "herself" and Sirous & Sons after Silverstein was relieved as counsel. Maralan sent his mother (i.e., Hodjati) to the hearing to request a continuance. There was no newly retained attorney when the court allowed Silverstein to withdraw. Maralan understood from his mother as long as they got an attorney before trial, they could get a continuance of trial.

Attorney Neufeld declared he was first contacted by Maralan on October 19, 2012, about handling the trial set for October 22. Neufled said he would only take the case if a 90-day continuance was granted. Maralan appeared to be under the impression that as long as he could tell the court on the morning set for trial he now had an attorney, the court was going to grant a continuance.

On January 29, 2013, the court denied the motion for relief from "defaults and default judgment." The court's minute order states, the defendants were put on notice by the motion to withdraw itself, and at the hearings on the motion and on Maralan's ex parte motion to continue trial, that Sirous & Sons must retain counsel. Nonetheless, Sirous & Sons showed up at trial without counsel, and Ghasemian did not appear at all. Accordingly, "the court struck the answer of defendant Sirous & Sons. . . and entered its default." The court found Sirous & Sons did not act "as a reasonably prudent person to establish excusable neglect[,]" when it failed to obtain counsel after being warned twice that it must do so. Similarly, Ghasemian had not acted reasonably by failing to appear at the trial call. The court also granted Laguna Dana's motion for attorney fees and costs awarding a total of $124,360.25. Notice of ruling was served on February 8, 2013, and on March 28, 2013, Sirous & Sons and Ghasemian filed a notice of appeal from the January 29, 2013, order.

DISCUSSION

I. The judgment against Ghasemian cannot be disturbed on this appeal.

We begin our discussion noting we cannot disturb the judgment against Ghasemian. Indeed it is not entirely clear who (or where) Ghasemian is. The judgment in this action is against Del Mar, Sirous & Sons, and Ghasemian. The notice of appeal was filed only on behalf of Sirous & Sons and Ghasemian. There is evidence in the record the man who held himself out to Laguna Dana representatives to be Ghasemian, was identified in a September 16, 2011, newspaper article as "Saeid Boustenaba Maralan" the manager of Sirous & Sons. It is unknown if that is the same person named Sam Maralan who made appearances in court as Sirous & Sons' representative. The defendants' counsel below referred to Ghasemian in correspondence sometimes as "Mr. Ghasemian" and sometimes as "Ms. Ghasemian." Maralan's declaration referred to Ghasemian as "her" and claimed "she" was "out of the country" at the relevant times. But the complaint in the Ghasemian Action, refers to Ghasemian as "he." Although an answer was filed on behalf of Ghasemian by attorney Silverstein, no one admitting to be Ghasemian has ever appeared in court or for depositions.

Furthermore, it is unclear whether Ghasemian is represented by counsel in this appeal, or should be considered an in propria persona litigant. The appellants' opening and reply briefs, filed by attorney C. Keila Nakasaka who had substituted in as attorney of record for both Ghasemian and Sirous & Sons after the motion to set aside the judgment was denied, contains absolutely no discussion or argument concerning the judgment against Ghasemian. On January 14, 2014, a substitution of attorney was filed in this court showing attorney Joseph C. Rosenblit substituted in as attorney of record for Sirous & Sons *only* and thus Nakasaka appears to still be attorney of record for Ghasemian. A supplemental brief filed January 17, 2014, by attorney Rosenblit was signed only on behalf of Sirous & Sons followed by a footnote stating Sirous & Sons is the only "party in interest remaining in this action as . . . Ghasemian is deceased." There

is no evidence in the record to support the assertion Ghasemian is deceased and in any event, there is absolutely no explanation as to why the judgment does not remain enforceable against Ghasemian. (See Prob. Code, § 9303 [enforcement of judgments law applies to decedent's estates].) It is the appellant's burden to demonstrate the existence of reversible error. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 626.) As an appellant, Ghasemian has completely failed in that burden. Accordingly, we cannot say the trial court erred by denying the motion to vacate the judgment against Ghasemian.

II. On the face of the appellate record, the judgment against Sirous & Sons is void.

We turn to the judgment as to Sirous & Sons. In its opening brief, Sirous & Sons argued the trial court abused its discretion by denying the motion to vacate the default and judgment under section 473, subdivision (b). It contended the court should have granted requests to continue the trial while Sirous & Sons found an attorney to represent the corporate defendant and, therefore, the judgment was obtained through mistake, inadvertence, surprise, or excusable neglect. We invited the parties to submit supplemental briefing on whether the judgment was void for a more fundamental reason—did the trial court act in excess of its authority by striking the answer of Sirous & Sons and entering a default judgment when it did not appear through counsel at trial?[3] We conclude that because there was an answer on file, the trial court had no

---

[3] In response to our request for supplemental briefing, on January 17, 2014, Sirous & Sons filed a supplemental brief addressing the requested issue and raising a new one—that the default judgment awarded damages in excess of those sought in the second amended complaint. The second amended complaint is not part of the record on appeal, but Sirous & Sons attached a copy of it to the supplemental brief. Although the attachment violates California Rules of Court, rule 8.204(d), which only permits attaching materials that are in the appellate record, because the document is part of the trial court record, we will augment the record on appeal to include it. We nonetheless disregard the new issue raised in the supplemental brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for first time in reply brief will ordinarily not be considered].)

power to order the entry of Sirous & Sons' default when it failed to appear for trial. The trial court's only option was to proceed with the trial in its absence under section 594[4] or continue the trial.

Our analysis is guided by this court's opinion in *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857 (*Heidary*), and *Wilson v. Goldman* (1969) 274 Cal.App.2d 573 (*Wilson*), cited extensively in *Heidary*. Accordingly, we begin with those cases.

In *Wilson*, *supra*, 274 Cal.App.2d 573, defendant answered the complaint and was properly served with notice of trial, but when trial was called neither defendant nor his attorney appeared. (*Id.* at p. 576.) The court entered defendant's default, and left

---

Similarly, in response to our request for supplemental briefing, Laguna Dana filed a supplemental brief on January 23, 2014, attaching three documents not contained in the appellate record, but specifically requesting we augment the appellate record with them. We will augment the record to include two of the documents because they are part of the trial court record: the Declaration of Margaret George filed October 24, 2012; and the declaration of Patrick N. Smith filed on October 24, 2012. The third document is an e-mail with no explanation as to its relevance or whether it is part of the trial court record. Accordingly, we disregard that document.

Finally, on February 10, 2014, Sirous & Sons filed a request for permission to file a second supplemental brief to which it attached several additional documents relating to a new motion to vacate the judgment it recently filed in the trial court. There is no cogent motion to augment the appellate record with these new documents and augmentation would be improper as these documents were not before the trial court when it ruled on the motion for relief from default. Sirous & Son's request to file a second supplemental brief is denied. Its request, however, also has attached a reporter's transcript from the trial court proceedings on October 22, 2012. On our own motion, we augment the record to include the October 22, 2012, reporter's transcript.

[4] Section 594, subdivision (a), provides, "In superior courts either party may bring an issue to trial or to a hearing, and, in the absence of the adverse party, unless the court, for good cause, otherwise directs, may proceed with the case and take a dismissal of the action, or a verdict, or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof shall first be made to the satisfaction of the court that the adverse party has had 15 days' notice of such trial . . . . If the adverse party has served notice of trial upon the party seeking the dismissal, verdict, or judgment at least five days prior to the trial, the adverse party shall be deemed to have had notice."

it for plaintiffs' counsel to "'prove up damages at some future date.' No evidence was taken, no trial was held and no continuance was granted. The case obviously was removed from the trial calendar." (*Ibid.*) Several months later, plaintiffs filed a "'Memorandum for Setting for Hearing (uncontested matter)'" describing the hearing as one to "'Prove up Damages.'" (*Ibid.*) Defendant was not served with the documents or given notice of the hearing, at which time the trial court entered a default judgment for plaintiffs. Defendant subsequently filed a motion to set aside the default judgment under section 473, primarily based on counsel's affidavit explaining he did not appear at the trial because he was hospitalized having just undergone major surgery. The trial court granted the motion and plaintiffs appealed. (*Wilson, supra,* 274 Cal.App.2d at p. 575.)

In affirming the trial court, *Wilson* concluded that regardless of whether the attorney's affidavit explaining his absence supported the trial court's order, the default judgment was properly set aside because it was void. (*Wilson, supra,* 274 Cal.App.2d. at pp. 577-578.) *Wilson* explained a default may not be entered when "an answer is on file, *whether the defendant does or does not appear at the time the action is called for hearing*. [Citations.] Where the defendant who has answered fails to appear for trial 'the plaintiff's *sole remedy* is to move the court to proceed with the trial and introduce whatever testimony there may be to sustain the plaintiff's cause of action.' [Citation.] In such case a plaintiff is entitled to proceed under the provisions of . . . section 594, subdivision 1, and he may do so in the absence of the defendant provided the defendant has been given . . . notice of the trial." (*Id.* at p. 576, first italics in original, second italics added.) *Wilson* went on to explain, "Where a defendant has filed an answer, neither the clerk nor the court has the power to enter a default based upon the defendant's failure to appear at trial, and a default entered after the answer has been filed is void [citations], and is subject to expungment at any time . . . . [Citations.] Here the plaintiffs did not proceed to trial *on the date set* and for which notice of trial had been served. Instead they

obtained an entry of defendant's default beyond the power and authority of the court to grant." (*Id.* at p. 577, italics added.)

In *Heidary, supra,* 99 Cal.App.4th 857, this court reached the same conclusion. In *Heidary*, defendants filed an answer but did not have notice of the date originally set for trial. When defendants failed to appear for trial, the court struck their answer and entered their defaults. Notice of entry of the defaults was served on defendants. (*Id.* at p. 860.) A month later, plaintiffs filed their default prove-up package and a default judgment was entered. The trial court subsequently denied as untimely defendants' section 473 motion to set aside the defaults. This court reversed concluding the judgment was void on its face and thus subject to attack at any time. (*Id.* at p. 862.)

Applying the reasoning of *Wilson*, *Heidary* concluded the trial court was without authority to strike a defendant's answer for failure to appear at trial. We noted although an answer may be stricken as a sanction for a defendant's misuse of the discovery process, "that provision has no application to the situation where defendant simply fails to appear at trial." (*Heidary*, *supra*, 99 Cal.App.4th at p. 864.) When the *Heidary* defendants failed to appear, "the court's only options . . . were to proceed with the trial in their absence, or to continue the trial." (*Ibid.*) As in *Wilson*, the *Heidary* plaintiffs did not immediately proceed with an uncontested trial. They "chose to wait until another day to prove up their damages, so no trial was held." (*Id.* at p. 863.)

We turn then to the present case. Laguna Dana argues *Wilson* and *Heidary* are distinguishable due to facts concerning notice. It argues that unlike the defendants in *Heidary*, Sirous & Sons and Ghasemian had notice of the October 22 trial date. Here, Ghasemian simply did not appear. Maralan appeared as a representative of Sirous & Sons, but the corporate defendant did not have counsel, and thus could not appear. (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 730 [a corporation cannot represent itself and must appear through counsel].) The notice distinction is without meaning. Indeed, as observed in *Heidary*, the defendant in *Wilson*

had notice of the original trial date but failed to appear, resulting in the erroneous entry of his default. Here, had Laguna Dana chosen to proceed with an uncontested trial *on* October 22, and presented evidence at that time supporting its case, a judgment in its favor would have been within the court's power. (§ 594, subd. (a).) But that is not what happened. Even though the trial court had jurisdiction to conduct an uncontested trial, it struck the corporate defendant's answer, entered its default, and ordered that matter would proceed as a default and directed Laguna Dana to return by October 24 with a default judgment. On October 24, Laguna Dana filed its evidence via declarations and exhibits, and the court entered its proposed judgment.

Laguna Dana argues the trial court in fact did proceed by way of an uncontested trial under section 594, subdivision (a), on October 22, and this was not really a default judgment at all. In its supplemental brief, Laguna Dana argues that on the day set for trial, it had its witnesses and evidence ready and offered to either put on its case right then or proceed via declarations and exhibits to be filed later—the course that was followed with the evidence submitted two days later. But the October 22 reporter's transcript confirms this was a default proceeding. Although Laguna Dana represented it was prepared to proceed with its evidence on October 22, the trial court and Laguna Dana agreed instead to enter Sirous & Sons' default and have Laguna Dana return *another day* with a default prove-up packet to secure a default judgment. If there was confusion, it was caused by Laguna Dana which specifically moved the court to strike Sirous & Sons' answer and enter its default because it no longer had counsel. Moreover, the distinction between calling the trial court's action on October 22 an entry of default, subject to a subsequent prove up, or a continuance of an uncontested trial, is not a meaningless distinction—i.e., it is not a mere mislabeling of the procedure that took place on October 22. And Laguna Dana's argument that because its evidentiary package was filed and the judgment entered two days later, whereas in *Heidary* and *Wilson* the default prove ups did not take place for several months, this should be construed as an

uncontested trial is unavailing. Once Sirous & Sons was placed in default, it had no right to do anything more. "The entry of a default terminates a defendant's rights to take any further affirmative steps in the litigation until either its default is set aside or a default judgment is entered." (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385.) A defaulted defendant has no standing to participate in the prove-up hearing, or to complain of the evidence introduced therein, other than to complain the damages awarded are excessive. (*Ibid.*; see also *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1745.)

In summary, we cannot construe the judgment as one following an uncontested trial. When Sirous & Sons appeared without counsel on the date set for trial on October 22, 2012, the court's only options were to proceed with the trial on that date or continue the trial. The court had no authority to strike Sirous & Sons' answer and enter a default based on its failure to appear at trial.[5] The resulting judgment against Sirous & Sons is void on the face of the record. (*Heidary*, *supra*, 99 Cal.App.4th at p. 862.) Because we conclude the judgment was void, we need not address the contentions concerning the trial court's denial of the motion to set aside the judgment under the discretionary provisions of section 473, subdivision (b).

---

[5] Laguna Dana also suggests the trial court did not strike Sirous & Sons' answer due to its failure to appear with counsel, but as a terminating sanction due to its failure to comply with discovery orders. The court's orders indicate the opposite. Both the October 22, 2012, and the January 29, 2013, minute orders state Sirous & Sons' answer was struck and the matter proceeded via default because it was unrepresented. Laguna Dana complains vacating the judgment against Sirous & Sons is futile because its failure to comply with discovery precludes it from introducing evidence at trial. The court did not rule on Laguna Dana's in limine motions and whether evidence exclusion or issue preclusion sanctions are appropriate remains to be decided.

DISPOSITION

The order denying the motion to vacate the default judgment against Sirous & Sons is reversed. The case is remanded with directions to vacate the judgment against Sirous & Sons only, to vacate the entry of default against Sirous & Sons, and to set the matter for trial as to Sirous & Sons. Appellants' motions filed December 9, 2013, to take judicial notice and to take additional evidence on appeal are denied. In the interests of justice, the parties shall bear their own costs and attorney fees on this appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.